

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA ) Greensboro, North Carolina  
vs. ) July 17, 2015  
JUAN MORENO-TAPIA, ) 11:30 a.m.  
Defendant. )  
 )  
 ) Case No. 1:14CR241-1  
 )  
 )

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE CATHERINE C. EAGLES  
UNITED STATES DISTRICT JUDGE

## APPEARANCES:

For the Government: ANAND P. RAMASWAMY, AUSA  
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Proceedings reported by stenotype reporter.  
Transcript produced by Computer-Aided Transcription.

## PROCEEDINGS

2 (At 11:30 a.m., proceedings commenced.)

3 (Defendant present.)

4 MR. RAMASWAMY: Your Honor, the Government would call  
5 United States versus Juan Moreno-Tapia in 1:14CR241-1,  
6 represented by Mr. Duberstein, on a motion hearing. We've been  
7 having the interpreter sworn as a precaution, as needed.

8                   THE COURT: All right. The courtroom deputy will  
9 swear the interpreter.

10 || (Interpreter sworn by the clerk.)

11 THE COURT: Mr. Moreno-Tapia, I believe we've been  
12 proceeding in English, and the interpreter has been present in  
13 case you need her. Is that how you want to proceed today?

14 THE DEFENDANT: Yes, ma'am.

15                   THE COURT: Because she is here, if you want her to  
16 interpret every single thing that is said, she will gladly do  
17 that. All you have to do is say so now. Or at any time during  
18 the proceedings, raise your hand, and I'll stop, and we'll  
19 switch over to that. Is that agreeable to you?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: All right. You can be seated. Can I  
22 have a minute to confer with the court reporter.

23 (Bench conference with court reporter.)

24 THE COURT: All right. So as I recall, we have  
25 talked several times about what should happen in this case.

1 result of the state court vacating his convictions for --  
2 primarily, we're talking indecent liberties, but I know we had  
3 the other assault charge, too -- and there's a motion to vacate  
4 the deportation order under 8, United States Code,  
5 Section 1326(d), there's a conditional order to withdraw his  
6 guilty plea, and there's a motion to dismiss the indictment. I  
7 believe you all have filed a bunch of briefs, and we've had  
8 argument, and I took it under advisement, right?

9 MR. DUBERSTEIN: That's my understanding, Your Honor.

10 THE COURT: Okay. I did not promise you all more  
11 argument time, I don't believe. So let me -- I have kind of a  
12 long order to enter because I don't have time to turn it into a  
13 written order which takes, you know -- takes me a couple weeks.  
14 So I'm just going to basically read it. But the upshot is, so  
15 we can start out and we all know, I'm going to deny all three  
16 of these motions. After I go over my reasons for that, then we  
17 can talk about what to do next.

18 So as I understand it, the facts are not in dispute.  
19 I'll recite them, and you all can correct me should I be wrong  
20 about any of these details.

21 In 2007, Mr. Moreno-Tapia pled guilty in state court  
22 to felony serious injury by vehicle and three counts of felony  
23 indecent liberties. Before pleading guilty, he was not advised  
24 by his attorney or by the Court that he would likely be  
25 deported as a result of the convictions.

1                   After he served an active prison term, the  
2 immigration authorities initiated deportation proceedings based  
3 on the indecent liberties conviction. Mr. Moreno-Tapia stated  
4 that he did not wish to contest removal or request withholding  
5 of removal and signed a form to that effect. He did not appeal  
6 the deportation order, and he was deported.

7                   Upon his deportation, he was advised that it would be  
8 illegal for him to return without permission. After  
9 deportation, he took no action to seek reconsideration of the  
10 deportation order or to reopen the deportation proceedings, nor  
11 did he seek to vacate the state convictions.

12                  At some point he returned to the United States  
13 without permission from Homeland Security. He was eventually  
14 arrested -- I think it was a burglary charge, some sort of  
15 larceny or burglary charge by state officials, and he  
16 assumed -- that's not really important. He was arrested by  
17 state officials on some charge, and he soon thereafter was  
18 charged in this court for failure to register as a sex offender  
19 and illegal reentry of a removed alien.

20                  After he pled guilty to illegal reentry pursuant to a  
21 plea agreement, he moved in state court to vacate his 2007  
22 state court convictions. The state court granted the motion  
23 finding Mr. Moreno-Tapia's guilty plea was not entered  
24 knowingly and voluntarily because of the absence of information  
25 concerning the immigration consequences. The state court cited

1     *Padilla versus Kentucky*, though it did not find ineffective  
2 assistance of counsel, which was the issue in *Padilla*, but it  
3 did find that Mr. Moreno-Tapia's due process rights were  
4 violated.

5                 Did I misstate any of the facts from the Government's  
6 perspective?

7                 MR. RAMASWAMY: No, Your Honor.

8                 THE COURT: From -- Mr. Duberstein, from your  
9 perspective?

10                MR. DUBERSTEIN: No, Your Honor. I would add to that  
11 that Mr. Moreno-Tapia had not actually seen the plea document  
12 in question until I showed it to him during this case.

13                THE COURT: I believe that's the evidence, and I'll  
14 accept that as a supplement to the findings of fact that I just  
15 found.

16                MR. DUBERSTEIN: Thank you, Judge.

17                THE COURT: But he certainly was present when he pled  
18 guilty. I mean, I don't think these happened in his absence,  
19 or he was physically present for -- yeah, but I certainly agree  
20 that's the evidence as you just stated, and I'll amend it to  
21 that.

22                Now, Mr. Moreno-Tapia contends he is entitled to  
23 relief because the deportation order at issue was invalid and  
24 issued in violation of his due process rights and generally in  
25 reliance on the *Mendoza-Lopez* case from the Supreme Court in

1 1987. I'm not going to give you all the full cites to these  
2 cases because we've all talked about them, and they're in the  
3 record. If that's not true, I may provide the cite.

4 So, first, I believe he contends that he meets the  
5 standards established in the illegal reentry statute concerning  
6 collateral attacks; and in the alternative, he contends that he  
7 should not be required to have exhausted his administrative  
8 remedies because his consent to deportation was not knowing and  
9 voluntary. Is that right?

10 MR. DUBERSTEIN: Yes, Your Honor.

11 THE COURT: Okay. And in the alternative, he  
12 contends that regardless of whether he met the statutory  
13 requirements for a collateral attack, his due process rights  
14 would be violated by allowing the Government to prosecute him  
15 for illegal reentry when the underlying conviction -- when the  
16 conviction underlying the deportation was vacated for  
17 constitutional infirmity. Did I accurately state your  
18 arguments, Mr. Duberstein --

19 MR. DUBERSTEIN: Yes, Your Honor, I'm just --

20 THE COURT: -- in summary form?

21 MR. DUBERSTEIN: I'm just referring to my original  
22 document just to make sure that -- and the Court at that point,  
23 you're just referring to the requirement of exhaustion, the  
24 first one.

25 THE COURT: Yeah, exhaustion and --

1 MR. DUBERSTEIN: Yeah.

2 THE COURT: -- the second one.

3 Now, let me start with the Section 1326 issue. So  
4 after the *Mendoza-Lopez* decision, Congress modified the illegal  
5 reentry statute to allow collateral attack on deportation  
6 orders if three circumstances are met: Mr. Moreno-Tapia has to  
7 show that he exhausted his administrative remedies, that the  
8 deportation proceedings improperly deprived him of the  
9 opportunity for judicial review, and that the entry of the  
10 deportation order was fundamentally unfair.

11 So looking at those first two requirements,  
12 Mr. Moreno-Tapia does not contend he was affirmatively  
13 misadvised by anyone involved in the deportation proceedings  
14 concerning his right to contest the deportation or to appeal  
15 the decision. He admits he signed the consent to deportation  
16 form. He never sought any sort of review of any part of the  
17 deportation proceedings, nor has he sought to reopen the  
18 deportation proceedings for reconsideration in light of the  
19 vacated state conviction. He has not identified anything that  
20 immigration authorities should have done during the course of  
21 the deportation proceedings that they did not do, and the Court  
22 thus finds that he's not met the first two requirements of the  
23 statute as those requirements would ordinarily be interpreted.

24 It's also not clear -- I'm relying on that, but I  
25 just would note that it is also not clear that he can show

1 fundamental unfairness of which prejudice is a part.  
2 Mr. Moreno-Tapia says he was deported, and that was the  
3 prejudice. But the test is not whether he would have been  
4 deported if he had not pled guilty, but whether he would have  
5 been deported if his conviction had been vacated.

6 You know, I kind of wandered around the immigration  
7 statutes. If you read these cases, these 1326(d) cases, a lot  
8 of them -- most of them have a pretty -- a pretty overwhelming  
9 discussion of immigration law and this prejudice point. You  
10 all have not briefed that for me, and I will just say I haven't  
11 really tried to figure that out. I kind of wandered around in  
12 the immigration statutes. I looked at *Williams versus*  
13 *Gonzales*, 499 F.3d 329, a Fourth Circuit case, which talked  
14 about an alien's right to reopen; but then in its subsequent  
15 history, it's pretty clear the Court really can't review the  
16 agency's decision on such a motion to reopen.

17 There was a case, an unreported case in 2005, *Parikh*,  
18 155 Fed Appx 635, which seems to indicate Mr. Moreno-Tapia  
19 would have been deported anyway even if the conviction was  
20 vacated. But then there was a later case called *Dung Phan*,  
21 667 F.3d 448, which seemed to indicate that maybe that wasn't  
22 true. So the upshot of that is I really have no idea about the  
23 prejudice. I'm not asking you to argue about it. I'm just  
24 saying it's not really been briefed. I think as the defendant  
25 presented it, the question was the deportation itself was the

1 prejudice, but I don't really think that's the test, and, you  
2 know, if this ever comes back, it would be my view we would  
3 have to explore that further, at least on the cases as I've  
4 read them so far. I would certainly hope that wouldn't be  
5 true, but it looks like it's true.

6 Further, I would note that Mr. Moreno-Tapia has not  
7 contended he is innocent of the indecent liberties charge, and  
8 he has offered no evidence of innocence. Indeed, there is  
9 substantial evidence of his guilt. You know, even beyond his  
10 guilty plea, the recent affidavit from the victim just says she  
11 didn't think there was anything wrong with what he did, but she  
12 basically admits that the sexual conduct with the 15-year-old  
13 occurred. So, it seems to me, it's very unlikely the third  
14 factor has been met, at least on the record that I have right  
15 now. So that means that Mr. Moreno-Tapia has not shown the  
16 statutory grounds necessary for a collateral attack on his  
17 deportation.

18 Now, next, he contends that the deportation was not  
19 knowing and voluntary. I believe the burden actually is on the  
20 Government to prove that it was. So this is a little bit  
21 different, and he relies on a number of cases such as *Sosa* out  
22 of the Second Circuit case, I think we talked about the *Ortiz*  
23 case out of the Fourth Circuit, and the *Cerna* case, also a  
24 Second Circuit case, which indicate a waiver of a right to  
25 appeal a deportation order which is not knowing and voluntary

1 and is invalid so that the exhaustion requirement is excused.

2 So these cases concern rights one has with the  
3 immigration proceeding. None of them concern a lack of  
4 knowledge about the reasons a deportable conviction might be  
5 subject to collateral attack. So it just does not seem to me  
6 that due process requires that immigration officials evaluate  
7 and advise someone facing deportation based on a deportable  
8 criminal conviction of all the possible reasons the conviction  
9 might be invalid or subject to being set aside or vacated.

10 And I don't think due process requires immigration  
11 officials to advise someone facing deportation based on such a  
12 criminal conviction that the person, you know, might want to  
13 think about challenging the validity of the conviction or ought  
14 to try challenge it in these proceedings.

15 I would also note that really the due process issue  
16 is Mr. Moreno-Tapia's due process rights were protected in  
17 state court. He had substantial due process protections at the  
18 state court level to seek a remedy for the unconstitutional  
19 conviction, which, of course, ultimately he took advantage of.  
20 You know, it's sort of interesting *Padilla* -- this is a side  
21 note -- *Padilla* has been held not to be retroactive. But, of  
22 course, the state court ruled on knowing and voluntary grounds  
23 which was -- and, of course, they can grant it even though it  
24 isn't retroactive, I suppose. There's still a violation.  
25 That's really a side point that's not important.

1                   But it seems to me his due process rights in  
2 connection with obtaining review of the underlying conviction  
3 were fully protected and that he did knowingly and voluntarily  
4 consent to the deportation. There's nothing to indicate any  
5 misinformation that was given to him, and it doesn't seem to me  
6 that the problem in his state court conviction bleeds over into  
7 the immigration proceeding.

8                   So, finally, the use of his vacated conviction, the  
9 use of the deportation, which was based on his vacated  
10 conviction, to prosecute him for illegal reentry. So, first,  
11 as I think I just indicated by the way I just said that, the  
12 new prosecution for illegal reentry is not based on the old  
13 vacated conviction, it is based on the deportation; and the  
14 deportation was based on a facially valid conviction at the  
15 time of the deportation which was a deportable offense. As I  
16 just mentioned, there were no problems with the deportation  
17 procedure, and it was valid when it was entered.

18                   I would also say courts have consistently held in a  
19 number of different contexts that the relevant question is  
20 whether the underlying conviction was in place at the time of  
21 the new conduct. I kind of got into this reading the *Robertson*  
22 case which was on the SORNA issue on the motion to dismiss, but  
23 in *Lewis versus United States*, 445 US 55, a defendant charged  
24 with possession of a firearm by felon contended that an  
25 underlying felony conviction was unconstitutionally obtained,

1 and the Court held this was of no moment as it "...did not  
2 alter the fact that the defendant had been convicted of a  
3 felony at the time he possessed the firearm." The *Lewis* court  
4 also said that "...it [was] important...that a convicted felon  
5 may challenge the validity of a prior conviction [and]  
6 otherwise remove his disability before obtaining a firearm."  
7 And as I mentioned previously, that is true here because  
8 Mr. Moreno-Tapia could have challenged the validity of the  
9 prior conviction before returning to the United States.

10 The Fourth Circuit subsequently applied *Lewis* in a  
11 situation where the underlying conviction had actually been set  
12 aside after the firearm was possessed but before trial, and  
13 that was the *Kahoe* case, 134 F.3d 1230. Both the *Lewis* courts  
14 and the *Kahoe* case specifically overruled due process  
15 arguments. Now, Congress has since amended that statute, so I  
16 believe vacated convictions aren't used anymore, but that  
17 really doesn't undermine the due process analysis, and *Lewis*  
18 continues to be applied in other contexts.

19 The *DuBose* case out of the Eleventh Circuit, 598 F.3d  
20 726, applied it in a firearms case involving someone who was  
21 subject to a domestic violence protective order, and they said  
22 the validity of the underlying protective order was irrelevant.  
23 That was also the decision out of the *McIlwain* case out of the  
24 Eleventh Circuit, 772 F.3d 688, which involved a challenge to  
25 the constitutional validity of a commitment to mental

1 institution in a firearms case. And then, of course, you have  
2 the *Robertson* case in the First Circuit in a SORNA prosecution.

3 So it seems to me that the due process argument has  
4 been rejected. And *Robertson*, of course, talks about the *Lewis*  
5 case in detail. *Mendoza-Lopez* doesn't help, it seemed to me,  
6 because in that case there were no avenues for judicial review  
7 of the decision at issue. Here, the state court MAR statute  
8 provides a well-established mechanism for judicial review of an  
9 allegedly unconstitutional statute, and the *Mendoza-Lopez* court  
10 specifically noted when it was talking about the *Lewis* case  
11 that in *Lewis* the defendant had an opportunity to challenge the  
12 predicate conviction in a judicial forum before he possessed  
13 the firearm, and we have that same thing here.

14 So the illegal reentry statute focuses on whether the  
15 defendant was deported, which is undisputed. His deportation  
16 was dependent on whether he had been convicted of a deportable  
17 offense, which is also undisputed, because at the time of his  
18 deportation he had been convicted. That deportation was lawful  
19 at the time it occurred, and at the time Mr. Moreno-Tapia  
20 reentered the country his convictions were in place and  
21 facially valid. So it is not a due process violation for an  
22 illegal reentry conviction to be based on a valid deportation  
23 order resulting from a valid -- facially valid conviction, even  
24 if after the reentry the underlying conviction is vacated on  
25 constitutional grounds.

1                   So in will say I had a lot of confusion, and I still  
2 have some confusion about the 16-level enhancement and the  
3 Government's concession on that because it sounded like the  
4 Government was conceding it would violate Mr. Moreno-Tapia's  
5 due process rights to add the 16-level enhancement at  
6 sentencing for being deported after conviction of an aggravated  
7 felony where that conviction has since been vacated. But they  
8 are not making the same due process concession about, for  
9 example, the SORNA count in the indictment when we got to the  
10 motion to dismiss the indictment. They were making kind of the  
11 opposite argument there. And the reliance on *Padilla* just  
12 didn't seem to me to really speak to the 16-level enhancement.  
13 It concerned the defendant's Sixth Amendment right to counsel.  
14 It's not retroactive. It really has nothing to do with due  
15 process rights. So I'm just not sure there is a due process --  
16 well, I don't think there is, and I will find there is not a  
17 due process problem in giving him the 16-level enhancement.

18                   The constitutional defect exception forecast in  
19 *Luna-Diaz*, I know it's been discussed by a lot of courts, but  
20 it was in a footnote. It was basically a throwaway. It didn't  
21 apply in the case, and it has overwhelmingly been quoted to  
22 note why it doesn't apply. It has never received serious  
23 examination and, it seems to me, to have a good bit of  
24 inconsistency with the holding in *Lewis*, as I have previously  
25 discussed. So here we are.

1 I do acknowledge the facial appeal of  
2 Mr. Moreno-Tapia's argument. It was stated in a nice shorthand  
3 manner in the *Bolieiro* case that I think somebody cited to me  
4 out of the District Court of Massachusetts, 923 F.Supp.2d 319,  
5 and the Court there said, "Given that the 1992 deportation  
6 order, Ms. Bolieira's actual removal, and this prosecution all  
7 stem from a constitutionally flawed and now-vacated conviction,  
8 common sense dictates the dismissal of this indictment." Maybe  
9 that's so. But that is essentially a policy argument more  
10 appropriate for Congress to consider or possibly it's an  
11 equitable argument, but it is not a due process analysis.

12 And I would just point out that even from a policy or  
13 equitable point of view, there are other facts than the fact  
14 that the conviction was vacated. Mr. Moreno-Tapia didn't do  
15 anything to vacate those convictions or seek reconsideration or  
16 try to reopen the deportation decision. He was deported, told  
17 he couldn't come back. He came back anyway. He didn't  
18 register as a sex offender even though his conviction was valid  
19 at the time. And he has not contended or shown that he is  
20 actually innocent of the charges, and there's substantial  
21 evidence of guilt.

22 And it's perfectly reasonable for Congress to say  
23 that persons with facially valid convictions of certain kinds  
24 of felonies should be deported and that those persons should  
25 not reenter the United States without permission, and, if those

1 convictions are for sex offenses, the person should register.  
2 If Congress wants to change this so that the subsequent conduct  
3 is not a crime when the underlying conviction is found to be  
4 constitutionally infirm, they can certainly do that just as  
5 they did after the *Lewis* case about possession of a firearm by  
6 a felon. Maybe they should. I just don't have -- that's just  
7 not my job. That's their job.

8 So I conclude that there were no due process defects  
9 in connection with the deportation process and that  
10 Mr. Moreno-Tapia does not meet the statutory requirements for a  
11 collateral attack. It is not a violation of due process when  
12 someone who has been lawfully deported based on a facially  
13 valid aggravated -- a facially valid felony conviction and who  
14 has been advised that it would be illegal to come back into the  
15 country is prosecuted for exactly that action.

16 So the Court will deny the defendant's motion to  
17 vacate the deportation order.

18 The motion to withdraw the guilty plea was  
19 conditional, so that is denied as moot.

20 To the extent the motion to dismiss the indictment is  
21 still before the Court, it is denied as well.

22 Now, I hope that was reasonably clear, okay, because  
23 I'm not going to do a written -- I'll just do a written order  
24 that denies them for the reasons stated in court. So that  
25 leaves us with sentencing, which is still a big mess.

1                   MR. DUBERSTEIN: Your Honor, if I could raise one  
2 issue before we move on?

3                   THE COURT: Yes.

4                   MR. DUBERSTEIN: I'm not sure -- the only reason I  
5 want to say it is because I'm not sure I raised it before. I  
6 wasn't sure it was relevant before. I think the Court made  
7 reference to the fact that -- several occasions that the  
8 defendant didn't raise his issue under the exhaustion  
9 requirement. We're really dealing in two worlds with that  
10 issue. One is the world of raising a collateral attack against  
11 a criminal complaint, or criminal conviction in his case, and  
12 one is reopening the immigration issue.

13                  THE COURT: Right.

14                  MR. DUBERSTEIN: So *Johnson* -- I can't remember the  
15 exact cite of *Johnson*, but it's a Supreme Court Case.

16                  THE COURT: From last week or two weeks ago, that  
17 *Johnson*?

18                  MR. DUBERSTEIN: No, no, not that *Johnson*, not the  
19 armed career criminal *Johnson*.

20                  THE COURT: Okay.

21                  MR. DUBERSTEIN: This is a *Johnson* case on 2255 cases  
22 and when you have the ability to file a collateral attack on a  
23 prior conviction, and they've ruled -- the Supreme Court has  
24 ruled that you have a reasonable amount of time from the time  
25 you discover the constitutional defect to file.

1                   So I think -- and his obviously wasn't a federal  
2 court. It was in state court.

3                   THE COURT: Right.

4                   MR. DUBERSTEIN: But, again -- and obviously we  
5 disagree with the Court's ruling that the constitutional  
6 violation doesn't bleed over into the immigration context. But  
7 I would raise the *Johnson* case as a cite in support of the fact  
8 that there was no way for him to reopen -- it would be futile  
9 for him to reopen his case without the knowledge of his  
10 suspect's prior conviction, and he didn't know about the  
11 suspect prior conviction until 2014.

12                  THE COURT: Well, I don't know. Maybe that's so.  
13 But he certainly knew when he was deported that the reason he  
14 was being deported was his conviction for indecent liberties,  
15 and what he didn't know when he pled guilty was that that  
16 conviction was going to lead to his deportation. So the thing  
17 that he didn't know that made his plea involuntary in 2007, he  
18 did know in 2009.

19                  So I appreciate your argument, and maybe you're  
20 right. It almost makes it worse in some ways because that  
21 means he had no reason to think it was okay to come back to  
22 this country when he had a valid conviction, I mean, on  
23 equitable grounds, and yet he came back anyway, which is not  
24 relevant to the due process analysis.

25                  MR. DUBERSTEIN: Thank you, Your Honor.

1                   THE COURT: All right. I'll note that. Now,  
2 speaking of *Johnson, Johnson* from just the other day.

3                   MR. DUBERSTEIN: Right.

4                   THE COURT: You know, I finally got these motions  
5 resolved, and then I realized I still had the guidelines issues  
6 to deal with, and they really seem to be not that clear to me  
7 at this point. I believe, starting with the easy part -- do  
8 you all have a presentence report in front of you? You might  
9 want it.

10                  MR. RAMASWAMY: Yes, Your Honor.

11                  THE COURT: Okay. Paragraph 24, which is these  
12 indecent liberties convictions we've just been talking about,  
13 and in the presentence report filed back, oh, my gosh, last  
14 November, he got three points to his criminal history level.  
15 And I believe it's clear under 4A1.2, specifically Note 6, that  
16 he should get zero points for that because that's been vacated.  
17 Does everybody agree with that?

18                  MR. RAMASWAMY: Yes, Your Honor.

19                  MR. DUBERSTEIN: Yes, Your Honor.

20                  THE COURT: Okay. So I believe that changes his --  
21 in paragraph 25, his total criminal history score would become  
22 two, and that would establish a criminal history score -- a  
23 criminal history category of II, right? For the Government?

24                  MR. RAMASWAMY: Yes, Your Honor.

25                  MR. DUBERSTEIN: Yes, Your Honor.

1                   THE COURT: All right. So that seems like the easy  
2 part.

3                   Now, if we turn back to the offense level calculation  
4 beginning on paragraph 10, first, the base offense level is  
5 still eight, and nothing has happened to change that. But when  
6 we get to paragraph 11 -- and I will just say I have not had  
7 time to really focus on the guidelines interpretations here,  
8 which, you know, kind of put the due process problem aside,  
9 because I don't think there's a due process problem with giving  
10 him 16 or 12 or any number of points. But in terms of what the  
11 guidelines say, I'm not completely sure. He should not get 16  
12 levels because 2L1.2(b)(1)(A)(ii) says you only get 16 if  
13 you've got points in your criminal history category  
14 calculation. So you can't get 16 because that seems to me to  
15 be pretty obvious. But it does say if you don't get points  
16 there, you would get 12. It's plus 12. And I don't know if  
17 the definition of "conviction" from Chapter 4 applies to this  
18 enhancement in Chapter 2 or not. So that's question one.

19                  Second, the reason for the enhancement at all only  
20 applies if indecent liberties is a crime of violence. So I --  
21 *Johnson* -- you know, this thought just occurred to me this  
22 morning. Is the *Johnson* case from a couple weeks ago going to  
23 have an effect on that? Everybody is nodding like, oh, yeah,  
24 it might, I assume. I don't know if it will or not. I just --  
25 that just occurred to me this morning.

1                   All right. So there we are. So that's the problem  
2 with 11. Is there a 12-point enhancement, or is there a  
3 zero-point enhancement is how I understand the question at the  
4 moment. I think there's also a question as to 17 and 18 at  
5 this point in the proceedings as to acceptance of  
6 responsibility. And then should it be zero for paragraph 11,  
7 there would be an inadequate criminal history question.

8                   I think we can do a couple of things. We can all  
9 just go away one more time and think about all these guidelines  
10 and try to figure them out. I am required to properly  
11 calculate the guidelines, and that is a bit of a mess today.  
12 On the other hand, the facts aren't really in dispute. So, you  
13 know, if you all want to take a little break, consult about  
14 these guidelines, I'll take my best shot at the guidelines  
15 today.

16                   But, you know, what really -- the guidelines are  
17 helpful because they identify the important facts. In this  
18 case, I know what the important facts are, so I can make an  
19 appropriate sentencing decision, sort of almost regardless of  
20 what the guideline calculation is because the important facts  
21 are he was arrested, he did get convicted, he did get deported,  
22 his conviction was vacated. These facts are all very  
23 important, you know, but I'm sensitive to the fact that the  
24 defendant may not have been prepared today to deal with the  
25 possible decision on acceptance of responsibility and

1 inadequate criminal history. I know I had talked with the  
2 probation officer about that, but I don't believe that may have  
3 been in any communication with you all.

4 So the alternatives that I see are that we take a  
5 recess for a month, let the Probation Office recalculate, put  
6 something out there in a couple of weeks, let you all look at  
7 it, object, and we'll come back. You know, that will take some  
8 time, but I obviously want to do it right. I know we've all  
9 been talking about, well, his guideline might just be zero to  
10 six; and while that's true, one might easily think that might  
11 not be enough time, so that might not be as big a problem -- I  
12 haven't decided what his sentence is, but, you know, that's  
13 perhaps not as big a problem as I was thinking it might be.

14 So we can do that, or we can take a short recess  
15 right this second, you all can talk; I can put it on for some  
16 time, you know, sooner than that without a formal  
17 recalculation; or I can just sentence him today doing the best  
18 I can with the guidelines and then making an appropriate  
19 decision under 4553(a). So shall we take a short recess and  
20 you all talk, or do you already know what you want to do  
21 without talking to each other?

22 MR. DUBERSTEIN: Your Honor, I would at least like  
23 time to consult with my client. I'm happy to talk to  
24 Mr. Ramaswamy, too.

25 THE COURT: All right. Absolutely.

1                   MR. DUBERSTEIN: I'm inclined to not have him  
2 sentenced today, but I want to hear what he has to say about  
3 how he wants this to proceed.

4                   THE COURT: All right. My inclination is, you know,  
5 to put it off and have it recalculated and have us all have  
6 time to think about it and go through the steps and deal with  
7 it, you know, appropriately. So that's the default. I just  
8 wanted to offer, you know -- and, of course, we can do it that  
9 way. Then if you all talk and you confer further with your  
10 client, we can reschedule it for sooner than that. I would  
11 have no real problem with that, assuming I could work you into  
12 my ever-increasing court schedule. So do you want me to just  
13 go ahead and schedule it, and then if you all work something  
14 out, or are you agreeing we can move it up, or do you want to  
15 talk to him, Mr. Duberstein?

16                  MR. DUBERSTEIN: If I could, Your Honor, yes. Thank  
17 you.

18                  THE COURT: Let me take about a 5-minute recess or 10  
19 minutes if you need longer.

20                  MR. DUBERSTEIN: Five is fine.

21                  THE COURT: All right. We'll take a 5-minute recess.

22                  (At 12:06 p.m., break taken.)

23                  (At 12:19 p.m., break concluded.)

24                  THE COURT: All right. Shall we have the Probation  
25 Office recalculate?

1                   MR. DUBERSTEIN: Yes, Your Honor. I've discussed  
2 with it Mr. Ramaswamy and my client. I think it would be  
3 better if we had time to prepare. The Court's raised a number  
4 of issues that I haven't even begun to research yet, including  
5 the *Johnson* issue but also the acceptance of responsibility.  
6 The 16-level issue I'm not sure has been settled one way or the  
7 other even on the original objection to it, the one that we  
8 agreed with the Government.

9                   THE COURT: Right. I think that's right. I  
10 wasn't -- yeah, I didn't -- I read everything you all said  
11 about the 16-level. It just didn't seem to really address the  
12 language of the guidelines, you know. So that's, I think, the  
13 question that I have left. I don't have a constitutional  
14 problem with it.

15                   So what's the best thing? Probation is quite backed  
16 up with meth -- methamphetamine conspiracies and such, I know  
17 from having the criminal term this month, and I don't really --  
18 I really haven't thought about the career offender crime of  
19 violence thing at all. *Johnson* may be just a nonissue, and it  
20 may be that the whole guidelines interpretation, paragraph 11,  
21 is easy, but it may not be. Do you all have a timing  
22 suggestion?

23                   MR. DUBERSTEIN: Your Honor, if I could, I would like  
24 to ask that we be doing the whatever it is -- let's set it for  
25 late August, if that's possible. Then if somehow -- I think

1 this was our agreement with the Government -- if we were able  
2 to agree on something or we came to terms and we felt like  
3 there wasn't anything else outstanding, and we were ready to  
4 go, we could ask the Court if you had an earlier time. I'm  
5 going to be out-of-pocket for the first two weeks of August  
6 basically, and I don't think we'll be ready. I think that  
7 would be the very bare minimum.

8 THE COURT: Oh yeah, that seems kind of -- I can do  
9 it on September 3 at 9:30.

10 MR. DUBERSTEIN: Your Honor, can I look at my  
11 calendar? I'm sorry. It's on my phone. I just want to make  
12 sure I'm not double-booking something. Your Honor, that would  
13 be fine. September 3 would be fine with us.

14 THE COURT: You all will be looking at the *Johnson*  
15 issue, and maybe -- maybe that's just not an issue. I  
16 certainly hope so. I'll ask the Probation Office to do a  
17 recalculation. Let's see. Today is the 17th. That's  
18 basically seven weeks from now. So how about if the Probation  
19 Office shoots for a draft on, say, August 7. That's three  
20 weeks for the Probation Office, and then you all respond within  
21 one week -- no, you're going to be gone the first two weeks in  
22 August.

23 MR. DUBERSTEIN: Yes, I will.

24 THE COURT: The 21st then. You all respond to her by  
25 the 21st and consult with each other and such. Do that usual

1 thing required by the local rules. Then I'll ask her to send  
2 me a final memo on the 27th of August, and that will give me a  
3 week. So do you all want her to just recalculate the  
4 guidelines, or do you want her to do -- would it be cleaner to  
5 do a revised final report when she --

6 MR. DUBERSTEIN: I think, Your Honor, given the fact  
7 that we've discussed the guidelines in not just one but several  
8 aspects, including acceptance and all these other things as  
9 well as criminal history, I think it would be better to have a  
10 full report, but I don't know. An abbreviated memorandum might  
11 be enough if that's -- if that includes all of those things,  
12 and it's clear enough for purposes of the record.

13 THE COURT: Any preferences?

14 MR. RAMASWAMY: No preference, Your Honor.

15 THE COURT: Well, I'll just -- I mean, obviously it  
16 has to include the guidelines conclusions. It has to include  
17 the criminal history. It may need to include the facts of, you  
18 know, the motion that was filed and the ruling on the motion.  
19 Maybe it's just better to do a revised final report.  
20 Obviously, lots of it won't change. So I would just ask you to  
21 do a revised draft or whatever, I don't know, named something  
22 like that. Then you all can object and confer. We'll do it as  
23 if it was -- since I'm not telling her how to recalculate the  
24 guidelines, I think I want to give you all a chance to object  
25 and confer before it's finalized by the Probation Office in the

1 usual way.

2 All right. So is everybody clear on the dates?

3 Ms. Winchester, have you got those for the minute entry?

4 THE CLERK: Yes, ma'am.

5 THE COURT: All right. I'm very sorry this is taking  
6 a long time, but I actually think we've moved pretty quickly  
7 once it kind of got to me, and it's just a complicated matter,  
8 and I do want to try to do it the right way. So there we are.

9 Anything else we need to take care of in his case today?

10 MR. DUBERSTEIN: Not today. Thank you, Your Honor.

11 THE COURT: No?

12 MR. RAMASWAMY: No.

13 THE COURT: All right. We will be adjourned.

14 (At 12:26 p.m., proceedings concluded.)

15 \* \* \* \* \*

16 C E R T I F I C A T E

17 I certify that the foregoing is a correct transcript  
18 from the proceedings in the above-entitled matter.

19  
20 Date: 11/23/2015 Joseph B. Armstrong, RMR, FCRR  
21 United States Court Reporter  
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Greensboro, NC 27401  
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